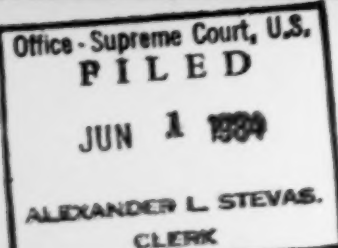


(2)
No. 83-1771



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR WERLING, CARL DRIESSNAK, LOREN SAAR,
and HENRY EICKELBERG, individually, and on behalf of
all similarly situated voting members of GRACE EVAN-
GELICAL LUTHERAN CHURCH OF RIVER FOREST,
ILLINOIS,

Petitioners,

vs.

GRACE EVANGELICAL LUTHERAN CHURCH OF RIV-
ER FOREST, ILLINOIS, an Illinois religious corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

BRIEF FOR RESPONDENT

JAMES A. SERRITELLA

JAMES A. KLENK

Counsel of Record

DONALD A. VOGELSANG

*Attorneys for Respondent,
Grace Evangelical Lutheran
Church of River Forest,
Illinois*

REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Pandick Midwest, Inc., Chicago • (312) 454-7600

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QUESTION PRESENTED

Whether the Illinois Appellate Court correctly held that a civil court is prohibited by the First Amendment from deciding a disputed issue of church government.

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WILBUR WERLING, CARL DRIESSNAK, LOREN SAAR,
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ER FOREST, ILLINOIS, an Illinois religious corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

BRIEF FOR RESPONDENT

STATEMENT

A. Nature of the Dispute

The principal parties to this dispute were Plaintiff Grace Evangelical Lutheran Church ("Grace")¹ and Defendants the Lutheran Church-Missouri Synod and its Concordia Teachers College ("Synod"). (App. A.)² Those parties, the only church bodies involved, each lost different portions of the appeal and decided to seek no further review by either the Illinois Supreme Court or this Court. (App. B.) The issues concerning those parties, including issues concerning the 1929 option, are no longer a part of this case.

¹ Grace is an independent congregation and has no parent corporations, subsidiaries or affiliates.

² Cites to "App." are to Petitioners' Appendix.

Petitioners, intervenors below, were four members of Grace who voted against withdrawal from the Synod and claimed a right to Grace's property under Article XV of Grace's constitution which reads:

If at any time a schism should take place in the congregation which God may graciously prevent, the property of the congregation and all benefits connected therewith shall remain with those members who shall adhere to the unalterable articles of this constitution.

The four Petitioners contended the vote by the majority of Grace's members to withdraw from the Synod created a schism and they (and not the overwhelming majority of the members of Grace) were the members who were conforming to the "unalterable articles" (all doctrinal provisions) of Grace's constitution.³

After Grace had withdrawn from the Synod and during the pendency of this case, Petitioners took their claim to the Synod's Northern Illinois District Commission of Adjudication. That Commission, according to the Synod's own bylaws, cannot make binding decisions that "affect the self-governing rights of the congregations." (Synod's Bylaw 5.39.) Without Grace's participation, the Commission issued a decision declaring Petitioners entitled to the protection of Article XV. (App. D.) The Synod itself then stripped that decision of any possible effect by arguing it was entitled to Grace's property despite any claim made by Petitioners. (App. A at 12.) Petitioners, nevertheless, continue to assert that the Commission's decision is somehow sanctioned by the Synod and binding on a civil court. Three Illinois Courts—the trial, appellate, and, in denying leave to appeal, the supreme court—rejected this claim and there is no reason for this Court to grant discretionary review merely to

³ The majority members were accused of violating Article II of Grace's constitution, which is entitled "Confession" and requires the congregation to follow the Holy Scriptures and the Symbolical Books of the Evangelical Lutheran church.

reject this claim once again or reaffirm that the result was reached under settled constitutional principles.

B. The Polity Issue

In *Jones v. Wolf*, 443 U.S. 595 (1979), this Court held that States may adopt their own rules for deciding church property disputes as long as those rules are consistent with First Amendment principles which prohibit civil courts from becoming entangled in issues of religious doctrine, practice, or government. One method approved by this Court is the polity analysis under which a court defers resolution of doctrinal issues to the highest ecclesiastical tribunal with the power to determine them and then enforces property rights in accordance with those decisions. *Watson v. Jones*, 80 U.S. 679, 724-25 (1871). Though the Illinois courts have traditionally applied that approach, the appellate court found that the polity analysis could not be applied here because the polity of the Synod was itself a matter of significant dispute. (App. at 13.)

Grace presented an abundance of evidence including Article VII of the Synod's constitution (App. A at 14); the Synod's bylaws; Grace's constitution; admissions of the Synod; books, articles and speeches of the Synod; scholarly treatises; and histories of the Synod which all agreed that from its founding in the 1840's until this dispute, the Synod had declared and all (including the United States Government) had believed that "[i]n polity the Missouri Synod is *pronouncedly congregational*." *Religious Bodies*, Vol. II, Part 2, p. 925 (U.S. Dept. of Commerce 1936) (emphasis added). In other words, in any matters concerning a congregation, the congregation is the "highest tribunal" for determining the dispute. E.g., C. Mundinger, *Government in the Missouri Synod* 196 (1947) (App. A at 14). The Synod cannot resolve such disputes because:

In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is but an advisory body.

(Synod Constitution, Art. VII (App. A at 14).)

To contradict that evidence, and create the dispute over polity, Petitioners presented the affidavit of Dr. Herbert Mueller, a vice-president of the Synod, who said the Synod had "hierarchical character," though it was basically congregational. (App. F.)⁴

The appellate court found that the polity approach was unusable because the First Amendment prohibited it from resolving the dispute over the Synod's polity. The court also found that the "neutral principles of law" analysis could not be used since Petitioner's claim depended solely on the resolution of doctrinal issues. As a result, the appellate court affirmed the trial court's finding that the parties simply had to be left as they were before this action was filed. (App. E.)

REASONS FOR DENYING WRIT

I.

The Appellate Court's Decision Is Fully In Accord With The Decisions Of This Court.

As this Court has often declared, civil courts are prohibited from resolving disputes over "theological controversy, church discipline, ecclesiastical government, or the conformity of the

⁴ In their brief, Petitioners also rely on Resolution 5-10A (Petition at 12) and attach that resolution as an Appendix (App. G). That resolution, passed in 1983, two years after the trial court decided this case, has never been a part of the record and thus Petitioners' attempt to use it here is impermissible. Petitioners have recently filed a new action in the Circuit Court of Cook County, Illinois, No. 83 L 53171, raising the effect of that resolution on the trial court's judgment in this case.

members of the church to the standards of morals required of them." *E.g., Serbian Eastern Orthodox Diocese v. Milojevich*, 426 U.S. 596, 714 (1976). The appellate court's decision simply heeds that command. Petitioners' claim under Article XV of Grace's constitution depended on the resolution of the issue of "the conformity of the members of the church to the standards of morals required of them." Prohibited from deciding that doctrinal issue, the appellate court attempted to apply the polity analysis first recognized in *Watson v. Jones*, 80 U.S. 679, 724-25 (1871). However, the court was then faced with an issue of "ecclesiastical government," *i.e.*, whether Grace or the Synod was the proper church body for resolving doctrinal issues, which it also could not decide because, as declared by this Court:

[W]here the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the [polity] approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 369-70 (1970) (Brennan, J., concurring); *accord, Jones v. Wolf*, 443 U.S. 595, 605 (1979).

Unable to use the polity approach, the court considered neutral principles of law. *Jones v. Wolf*, 443 U.S. 595 (1979). However, that approach could not aid the Petitioners since their claim to the property depended solely on the resolution of religious issues, leaving the court with no choice but to declare it could not civilly enforce the alleged rights of the Petitioners.

Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

In essence, the appellate court decided no religious issues and no new federal questions but simply applied well-settled law to the particular facts of this case.

II.

The Present Status of This Case Mandates Against Discretionary Review

Grace firmly believes that the Synod's polity is congregational and that the courts below should have deferred resolution of any doctrinal issues to it. In fact, the only other appellate courts that have directly ruled on the issue have held the Synod to be congregational in polity. *Peace Evangelical Lutheran Church v. Gerberding*, ____ N.W.2d ____ (Mich. App., Docket No. 63878, June 27, 1983) (attached as an Appendix) (rejecting a claim by minority members of a congregation under identical facts to this case); *Mertz v. Schaffer*, 271 S.W.2d 238, 241 (Mo. App. 1954). However, after the appellate court's ruling, Grace, the Synod, and Concordia College, the principal disputants and only church bodies involved, though all unsatisfied to some degree with the outcome, all determined not to pursue this case any further.

None of the church bodies has a dispute to present to this Court. The major dispute concerning the 1929 option is now over. Review of Petitioners' claim would simply be the review of a collateral matter in this case without the principal players. This Court should not grant review to decide issues relating to the Synod when that body has now purposefully removed itself from these proceedings.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES A. SERRITELLA

JAMES A. KLENK

Counsel of Record

DONALD A. VOGELSANG

Attorneys for Respondent,

Grace Evangelical Lutheran

Church of River Forest,

Illinois

REUBEN & PROCTOR

19 South LaSalle Street

Chicago, Illinois 60603

(312) 558-5500

APPENDIX

Filed June 27, 1983

STATE OF MICHIGAN

Court of Appeals

Peace Evangelical Lutheran Church
of Southgate, Michigan, a Michigan
Corporation, Lawrence A. Brown,
Dan Cojocar, Patsy Sirianni, Esther
L. Fink and Edward Klopp,

Plaintiffs-Appellants,

v.

No. 63878

Dr. Keith Gerberding, Dennis M.
Bux, Stanley Pritchett, George Mill-
er, Jack Richter, Ruth Gierke, Ar-
nold Voss, Glenn DeFeyter, Theo-
dore Jacob, Norman Kaminski,
Milton Rehbein, Walter Evans,
Robert Gnadt, Howard Thomas,
Richard Ebendick, Albert Hichson,
John Balger, Sr., Stanley Stull,
Linda Bunte, Arthur Weiss, Ken-
neth Gierke, and Donald Morton,

Defendants-Appellees.

BEFORE M.H. Wahls, P.J., R.S. Gribbs and
M. Warshawsky*, JJ.

PER CURIAM

This case involves a church property dispute between two factions of the Peace Evangelical Lutheran Church of Southgate, Michigan. Plaintiffs, who represent the minority of the congregation, instituted this action against defendants, who represent the majority, seeking return of the church property to

* Circuit Judge, sitting on the Court of Appeals by assignment.

their control and possession. The trial court granted defendants' motion for summary judgment on the ground that there was no genuine issue as to material fact and defendants were entitled to judgment as a matter of law, GCR 1963, 117.2(3). Plaintiffs appeal as of right.

The material facts relevant to this dispute were stipulated to by the parties below. Peace Evangelical Lutheran Church of Southgate, Michigan, as it is presently known, was incorporated under the laws of the State of Michigan in 1947. A church constitution providing that the congregation would affiliate with the Lutheran Church—Missouri Synod, and by-laws were adopted. The local constitution and by-laws were submitted to the Missouri Synod for approval pursuant to Article VI, Section 5 of the Constitution of the Lutheran Church—Missouri Synod.

Articles VIII and XII of the Synod Constitution and Article I of the Synod By-Laws describe the organizational structure of the Lutheran Church—Missouri Synod. The Synod is composed of Districts based on geographical area. Several circuits compose a district. The national administration is based in St. Louis, Missouri. Every two years, a national convention is held where proposed resolution are debated and voted on. Each circuit selects one lay representative and one Pastor as representatives to the national convention.

During the 1970's, many controversies arose within the Lutheran Church—Missouri Synod. In 1979 some members of the congregation proposed amending the local church's constitution so as to permit the congregation to voluntarily withdraw from the Missouri Synod and affiliate with the English Synod of the Association of Evangelical Lutheran Churches (AELC), an organization wholly separate from and unaffiliated with the Lutheran Church—Missouri Synod (At the present time, the AELC has over 200 member congregations, virtually all of which were formerly associated with the Lutheran Church—Missouri Synod).

The proposed amendments were adopted on May 21, 1979 by a majority vote of the voters assembly, 147 in favor and 29 opposed. The parties stipulated that, procedurally, the vote was correctly executed. The majority faction of the congregation subsequently withdrew from the Missouri Synod and affiliated with the Association of Evangelical Lutheran Churches.

While the proposed amendments were still being debated, and before the vote, certain members of the minority contacted the Commission of Adjudication of the Michigan District of the Lutheran Church—Missouri Synod regarding the proposed amendments. Four months after the amendments were approved, the commission rendered a decision in favor of plaintiffs, the minority.

The Commission found that the action taken by defendants was illegal according to Article (V) (E) (2) of the local church's constitution as it existed prior to the 1979 amendments. Article (V) (E) (1) and (2) provided:

- "1. The congregation as a body owns all church property and the property of the various organizations of the congregation,
- "2. And should at any time, a separation take place in this congregation on account of doctrine, the property of the congregation and all the benefits connected therewith shall remain with those members through [sic] a minority, who shall continue to adhere to the doctrines tenets and practices which prevailed when this Constitution was adopted."

The Commission found that the action taken by defendants was because of a dispute among the members of the congregation over doctrinal issues. Therefore, it was the opinion of the Commission that the minority group, plaintiffs, who wished to remain with the Lutheran Church—Missouri Synod had the right to control and possession of all the church property.

As a group, the individual plaintiffs, along with those others who ceased active association with the congregation after May 21, 1979, contacted the Michigan District of the Missouri Synod and requested reinstatement as a congregation. This request was granted. After being recognized by the Lutheran Church - Missouri Synod as the legitimate representative body of Peace Evangelical Lutheran Church, and with the decision of the Adjudication Commission in hand, some of the individual plaintiffs wrote a letter to defendants dated October 19, 1979, in which they demanded the church property. The congregational majority did not respond to this demand. Consequently this lawsuit was filed.

Recently, in *Bennison v Sharp*, ____ Mich App ____; ____ NW2d ____ (Docket No. 58097, *rel'd*, 12/6/82), *this Court reviewed the limitations placed by the First Amendment upon judicial resolution of church property disputes. As noted in Bennison, supra*, the United States Supreme Court has expressly approved of two methods by which civil courts may be guided in such matters: 1) the polity or hierarchical theory, pursuant to which questions concerning the rights to property held by religious bodies are resolved according to whether the church involved is congregational or hierarchical; and 2) the neutral principles of law theory, whereby traditional principles of civil property law are applied with reference to the language of the deeds, the terms of local church charters, state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. See *Jones v Wolf*, 443 US 595; 99 S Ct 3020; 61 L Ed 2 775 (1979), *Watson v Jones*, 13 Wall 679; 80 US 679; 20 L Ed 2d 666 (1872). "Indeed 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" *Jones v Wolf*, 443 US at 602, quoting *Maryland & Virginia Eldership of the Churches of God v Church of God at Sharpsburg*, 396 US 367, 368; 90 S Ct 499; 24 L Ed 2d 582 (1970) (Brennan J., concurring) (Emphasis in original).

The trial court in this case, in a scholarly opinion, utilized the first method. Concluding that Peace Evangelical Lutheran Church was of congregational polity, the trial court applied "the ordinary principles which govern voluntary associations," and determined that the church property remained under the legal control of the majority of the congregation represented here by defendants. See *Bennison v. Sharp, supra*, slip op. at 5.

Plaintiffs on appeal assert that the trial court erred in determining that the church was entirely congregational. They argue that the court failed to recognize the hierarchical aspect of the Missouri Synod on doctrine and erred in refusing to defer to the decision of the Michigan District Commission of Adjudication.

We agree with the trial court that perusal of the Constitutions and by-laws of the congregation and the Lutheran Church-Missouri Synod establishes that the Peace Evangelical Lutheran Church is congregational, a religious body "which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority." *Bennison v. Sharp, supra*, quoting *Watson v. Jones*, 80 US at 722-723.

Article V of the local church's constitution clearly reserves to the congregation the ultimate decision-making authority with respect to its own affairs:

"The congregation through the voting members shall have the supreme power in the spiritual and material *administration* and *management* of its own ecclesiastical and congregational affairs. . . ." (emphasis added).

Both the constitution and the by-laws of the Missouri Synod recognize the local congregation's right to self-government, and that the Synod functions solely as an advisory body to the congregation. Article VII of the Constitution provides:

"In its relation to its members the Synod is not an ecclesiastical government exercising legislative or coercive powers, and with respect to the individual congregation's right of self-government it is not an advisory body. Accordingly, no resolution of the Synod imposing anything upon the individual congregation is of binding force if it is not in accordance with the Word of God or if it appears to be inexpedient as far as the condition of a congregation is concerned."

Section 1.09 of the By-laws provides:

b. The Synod expects every member congregation to respect its resolutions and to consider them of binding force if they are in accordance with the Word of God and if they appear expedient as far as the condition of the congregation is concerned. *The Synod, being an advisory body, recognizes the right of the congregation to be the judge of the expediency of the resolution as applied to its local condition.* However, in exercising such judgment, a congregation must not act arbitrarily but in accordance with the principles of Christian love and charity.

"c. Membership of a congregation in the Synod gives the Synod no equity in the property of the congregation." (Emphasis added.)

No provision in the local or general church's constitution or by-laws grants to the Synod or its Commission of Adjudication the power to issue a decision, binding on Peace Evangelical Lutheran Church, regarding application of Article V (E)(2). The Commission's decision is at most advisory, given the absence of such a provision and the clearly congregational nature of the church itself.

The trial court determined, quite correctly, that application of "neutral principles of law" was not permissible in this case. Judicial enforcement of Article V (E)(2) would necessitate a determination by the court of whether the dispute here was on account of doctrine and, if so, which faction continues to adhere to the doctrines, tenets and practices which prevailed when the

constitution was adopted. A civil court is prohibited by the First Amendment from resolving church property disputes on the basis of religious doctrine or practice. *Bennison, supra*. As application of Article V (E) is conditioned upon a finding of departure of doctrine, it may not be civilly enforced. See *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 US 367, 370; 90 S Ct 499; 34 L Ed 2d 585 (1970) (Brennan, J., concurring).

Affirmed.

/s/ M. H. WAHLS

/s/ R. S. GRIBBS

/s/ M. WARSHAWSKY